

68514-541M

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SEP 29 1992

MONT. DEPT. of NATURAL
RESOURCES & CONSERVATION

SEP 28 1992
by EMILE KIMMET
CLERK

by _____ Deputy

MONTANA NINTH JUDICIAL DISTRICT COURT, TETON COUNTY

KARL RAPPOLD,

Plaintiff,

vs.

ROBERT E. DUROCHER,

Defendant.

No. 88-DV-024

NOTICE OF ENTRY OF JUDGEMENT

TO: KARL RAPPOLD and his attorneys James T. Harrison,
Jr. and Gregory W. Duncan

You will please take notice and you are hereby
notified that Memorandum and Order of the Court affirming
the final administrative decision of the Department of
Natural Resources and Conservation, dated August 31, 1992,
and filed on the 18th day of September, 1992, in favor of
the Defendant, Robert E. Durocher, was on the 18th day of
September, 1992, duly entered by the Clerk of the above
entitled Court in Volume 4 of Judgments at Page R
thereof.

DATED this 28 day of September, 1992.

CLERK OF COURT

BY: Emile Kimmet
Deputy Clerk

CASE # 68514

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CERTIFICATE OF MAILING

This is to certify that a copy of the foregoing was
duly served by mail upon the following attorneys of record
at their address or addresses this 28 day of September,
1992:

- Robert P. Goff
P.O. Box 1645
Great Falls, MT 59403
- James T. Harrison
Gregory W. Duncan
2225 Eleventh Avenue, Suite 21
Helena, MT 59601
- Gary Fritz
Fred W. Robinson
DNRC
1520 East Sixth Avenue
Helena, MT 59620-2301

Clerk of District Court
15/ **EMILE KIMMET**
Deputy Clerk

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SEP 21 1992

MONT. DEPT. of NATURAL
RESOURCES & CONSERVATION

SEP 18 1992

EMILE KIMMET
CLERK

by *Inducia Bouma*
Deputy

MONTANA NINTH JUDICIAL DISTRICT COURT, TETON COUNTY

KARL RAPPOLD,

No. 88-DV-024

Plaintiff,

MEMORANDUM AND ORDER

-vs.-

ROBERT E. DUROCHER,

Defendant.

The standards for judicial review of a determination by an administrative agency are set forth in Section 2-4-704, M.C.A., which provides:

(1) The review shall be conducted by the court without a jury and shall be confined to the record. In cases of alleged irregularities in procedure before the agency not shown in the record, proof thereof may be taken in the court. The court, upon request, shall hear oral argument and receive written briefs.

(2) The court may not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings. The court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because:

(a) the administrative findings, inferences, conclusions, or decisions are:

(i) in violation of constitutional or statutory provisions;

(ii) in excess of the statutory authority of the agency;

(iii) made upon unlawful procedure;

(iv) affected by other error of law;

(v) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record;

(vi) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion; or

CASE # 68514

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1 (b) findings of fact, upon issues essential to the
2 decision, were not made although requested.

3 Findings of Fact by an administrative agency are subject to
4 the "clearly erroneous" standard of review and Conclusions of Law
5 are subject to the "abuse of discretion" standard of review. P.W.
6 Berry Co. Inc. v. Freese, 779 P.2d 521 (Mont. 1989).

7 Applying the standard of review for either Findings of Fact
8 or Conclusions of Law, a review of the record discloses no basis
9 to alter the final DNRC decision.

10 ORDER

11 IT IS HEREBY ORDERED that the final administrative decision
12 of DNRC be and the same is hereby affirmed.

13 DATED this 31st day of August, 1992.

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15 

16 R. D. McPHILLIPS, DISTRICT JUDGE

17 cc: James T. Harrison, Jr. / Gregory W. Duncan

18 Robert P. Goff

19 Gary Fritz

20 B.B. 9/18/92

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SEP 29 1992

MONT. DEPT. of NATURAL
RESOURCES & CONSERVATION

SEP 28 1992
by EMILE KIMMET
CLERK
Deputy

MONTANA NINTH JUDICIAL DISTRICT COURT, TETON COUNTY

KARL RAPPOLD,

Plaintiff,

vs.

ROBERT E. DUROCHER,

Defendant.

No. 88-DV-024

NOTICE OF ENTRY OF JUDGEMENT

TO: KARL RAPPOLD and his attorneys James T. Harrison,
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thereof.

DATED this 28 day of September, 1992.

CLERK OF COURT

BY:

Emile Kimmet
Deputy Clerk

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CASE # 68514

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Gary Fritz
Fred W. Robinson
DNRC
1520 East Sixth Avenue
Helena, MT 59620-2301

15) EMILE KIMMET
Deputy Clerk

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NOV 04 1989

BEFORE THE DEPARTMENT OF
NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA

BY _____

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* * * * *

IN THE MATTER OF THE APPLICATION)
FOR BENEFICIAL WATER USE PERMIT) FINAL ORDER
NO. 68514-s41M BY ROBERT E.)
DUROCHER)

BY _____

* * * * *

A Proposal for Decision in the above entitled matter was entered on June 26, 1989. On August 7, 1989, Robert E. Durocher ("Permittee") filed exceptions to the Proposal. No written exceptions to the Proposal were filed by Karl Rappold ("Complainant"). Oral argument on Permittee's exceptions was held on September 25, 1990, in the Courthouse Annex in Great Falls, Montana at 9:30 a.m.

Permittee appeared and was represented by counsel Robert E. Goff. Complainant appeared and was represented by counsel Gregory W. Duncan.

Permittee's written exceptions allege: (1) Complainant has not established adverse impact to his rights in Scoffin Creek; (2) Complainant has not established a right to a 10 g.p.m. flow rate in Scoffin Creek; and (3) the Proposed Order's monitoring requirements are excessive.

The Department has reviewed the record, the Proposal for Decision, and the Permittee's exceptions. After considering both parties' arguments the Department cannot conclude that Complainant would be adversely affected by the Permittee's dam.

CASE # 68514

There is also insufficient evidence in the record for the Department to conclude that Complainant will require a flow rate of 10 g.p.m. in Scoffin Creek to satisfy his stockwatering right. Consequently, the Department must reject Proposed Conclusions of Law Nos. 9 and 10. Moreover, absent the showing of adverse effect, the Department must also conclude that Proposed Conditions B, C, and D are not warranted.

Although there is insufficient evidence to conclude that Complainant will be adversely affected, the Department acknowledges a potential for damages to downstream water users exists because of Permittee's dam. Therefore, Proposed Condition A will be adopted for this Final Order. Moreover, the Department encourages the Permittee to take reasonable measures to ensure that Complainant is not damaged by the dam.

FINAL ORDER

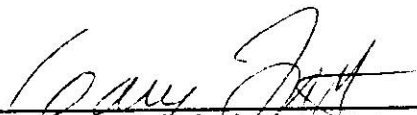
Subject to the modification of Conditions and Conclusions specified above, the Proposal for Decision is adopted in its entirety. Permit to Appropriate Water No. 68514-s41M is reissued subject to the additional condition as follows:

Issuance of this permit by the Department shall not reduce the Permittee's liability for damages caused by exercise of this permit, nor does the Department, in issuing this permit, acknowledge any liability for damages caused by exercise of this permit, even if such damage is a necessary and unavoidable consequence of the same.

NOTICE

The Department's Final Order may be appealed in accordance with the Montana Administrative Procedure Act by filing a petition in the appropriate court within 30 days after service of the Final Order.

Dated this 17 day of October, 1990.



Gary Fritz, Administrator
Department of Natural Resources
and Conservation
Water Resources Division
1520 East 6th Avenue
Helena, Montana 59620-2301
(406) 444-6605

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Final Order was duly served upon all parties of record at their address or addresses this 17th day of October, 1990 as follows:

Robert E. Durocher
2715 Fifth Avenue North
Great Falls, MT 59401

Gregory W. Duncan
Harrison, Loendorf & Poston
2225 11th Avenue, Suite 21
Helena, MT 59604

Pondera County Conservation
District
Pondera Village Shopping
Center
Conrad, MT 59425

Bob Larson, Field Manager
1708 West Second Street
P.O. Box 1828
Havre, MT 59501

Robert E. Goff
Attorney at Law
P.O. Box 1645
Great Falls, MT 59403

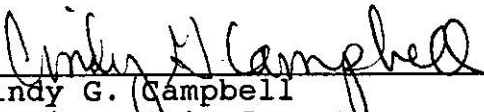
Karl Rappold
P.O. Box 182
Dupuyer, MT 59432

Silvio (Sam) Rodriguez
Hearing Examiner
Department of Natural
Resources & Conservation
P.O. Box 438
Lewistown, MT 59457

CASE # 68514

Larry Holman, Chief
Water Rights Bureau
Department of Natural Resources
and Conservation
1520 East 6th Avenue
Helena, MT 59620-2301

Fred W. Robinson
Legal Unit
Department of Natural
Resources & Conservation
1520 East 6th Avenue
Helena, MT 59620-2301


Cindy G. Campbell
Hearings Unit Secretary

BB
M

BEFORE THE DEPARTMENT
OF NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA

* * * * *

IN THE MATTER OF BENEFICIAL WATER)
USE PERMIT NO. 68514-s41M ISSUED) PROPOSAL FOR DECISION
TO ROBERT E. DUROCHER)

* * * * *

Pursuant to the Montana Water Use Act and to the contested case provisions of the Montana Administrative Procedure Act, a hearing in the above-entitled matter was held on March 23, 1989, in Great Falls, Montana. The record was closed at the conclusion of this hearing.

APPEARANCES

Complainant Karl Rappold (hereafter, "Complainant Rappold") appeared by and through counsel James T. Harrison, Jr.

Permittee Robert E. Durocher (hereafter, "Permittee Durocher") appeared by and through counsels Robert E. Goff and Ron Nelson.

Bob L. Larson (hereafter, "Larson") Manager of the Havre Water Rights Bureau Field Office, Department of Natural Resources and Conservation, was called upon as a witness by Permittee Durocher. Hereafter, reference to the Department of Natural Resources and Conservation will be "Department" or "DNRC".

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PRELIMINARY MATTERS

Counsel for Permittee Durocher objected to the introduction of Complainant's Exhibit 1, which is a computer printout containing nine pages of abstracts for Water Right Claim Nos. W159381, W159382, W159383, W159384, W159385, W159386, and W159387. The basis for the objection to these abstracts is that Complainant Rappold did not perfect the irrigation rights; that Complainant Rappold was not able to show these rights were properly used; and, therefore, that these abstracts are irrelevant and that Complainant Rappold has abandoned his water right.

Administrative Hearings pursuant to the Montana Water Use Act do not adjudicate the pre-1973 water rights claimed by any one party. Determination of the validity of a particular claim of existing water right, whether the right is valid or whether the right was abandoned, is beyond the jurisdiction of the DNRC Administrative Hearing. The jurisdiction as to the validity of claimed water rights rests with the Water Courts of the State of Montana. Therefore, the objection based on allegations that Complainant Rappold has abandoned his water rights is denied.

Under the DNRC Administrative Hearing, the Examiner must weigh the evidence introduced as to its relevance to the issue at hand. In deciding the relevance of Complainant's Exhibit 1 the Examiner finds as follows:

1. Existing water right abstracts for Claim Nos. W159382, W159384, W159385, and W159387 are irrelevant to this case, since they pertain to sources of water other than Scoffin Creek.

2. Since the remaining Claim Nos. W159381, W159383, and W159386 have not even reached the Temporary Preliminary Decree stage, which means that they have not been properly examined by the DNRC under the guidelines established by the Supreme Court, they are accepted for the record for the limited purpose of generally indicating Complainant Rappold's undetermined stock watering and subirrigation claimed rights from Scoffin Creek.

During direct testimony Complainant Rappold testified as to his concern for the safety of the dam built by Permittee Durocher, and to the possible consequences if said dam would breach.

Counsel for Permittee Durocher objected to this testimony on the grounds that there had been no demonstration of Complainant Rappold's engineering capabilities in relation to determining the safety of the dam. Objection is hereby overruled. Complainant Rappold has property located directly downstream from the Permittee's dam, and he has familiarity with the area and experience with streamflows in this drainage. Therefore, his opinions are admissible, though they will not be accorded the same weight as expert testimony particularly as to technical aspects of dam safety.

EXHIBITS

Complainant Rappold submitted one exhibit for inclusion in the record in this matter. Permittee Durocher filed objection to the introduction of this exhibit. (See Preliminary Matters section for the ruling on the introduction of Complainant's Exhibit 1.)

Complainant's (Objector's) Exhibit 1 contains nine pages of existing water right printout abstracts for Claim Nos. W159381, W159382, W159383, W159384, W159385, W159386, and W159387.

Permittee Durocher submitted nine exhibits for inclusion in the record in this matter. All of the Permittee's exhibits were admitted for inclusion in the record in this matter without objection. Note: All of the Permittee's exhibits are marked as "Applicant's" exhibits.

Permittee's (Applicant's) Exhibit 1 is a copy of an Abstract of Contract for Deed between Glen and Lola Thoreson and Robert E. Durocher.

Permittee's (Applicant's) Exhibit 2 is a magnified copy of U.S.G.S. topographical map showing the location of the Permittee's development in relation to Scoffin Creek and to the land owned by the Permittee.

Permittee's (Applicant's) Exhibit 3 is a 35mm, 3" x 5" color photograph showing Permittee Durocher's impoundment.

Permittee's (Applicant's) Exhibit 3A is a duplicate of Exhibit 3, showing with black ink the approximate location of the excavated spring (underwater) and of the earth ridge (underwater)

that separates the original impoundment from the present impoundment.

Permittee's (Applicant's) Exhibit 4 is a copy of a letter from Permittee Durocher to Bob Larson indicating the flow measurements taken by Permittee Durocher on Scoffin Creek at various times during August and September, 1988.

Permittee's (Applicant's) Exhibit 5 is a hand drawn map, not to scale, showing the location of all the sources of water that contribute to Permittee Durocher's impoundment.

Permittee's (Applicant's) Exhibit 6 is a copy of a Certificate of Water Right issued by the Department of Natural Resources and Conservation to Robert E. Durocher for a developed spring that is used for domestic and stockwatering purposes.

Permittee's (Applicant's) Exhibit 7 - No exhibit 7 was offered for the record.

Permittee's (Applicant's) Exhibit 8 is a copy of a letter from Complainant Rappold to the Teton County Soil Conservation Service.

Permittee's (Applicant's) Exhibit 9 is a copy of the Objection, Form No. 611, filed by Complainant Rappold to the impoundment created by Permittee Durocher as specified by Permit No. 68514-s41M.

Larson submitted on behalf of the Department one exhibit for inclusion in the record in this matter. The Department's exhibit was admitted for inclusion in the record in this matter without objection.

Department's Exhibit 1 is a legal size sheet of paper that contains two 35 mm, 3" x 5" color photographs taken by Larson on November 9, 1988, showing the water seepage from Permittee Durocher's reservoir.

There was no objection to any of the contents of the Department files.

PROPOSED FINDINGS OF FACT

1. Section 85-2-306(3), MCA, provides that, "A permit is not required before constructing an impoundment or pit and appropriating water for use by livestock if the maximum capacity of the impoundment or pit is less than 15 acre-feet and the appropriation is less than 30 acre-feet per year and is from a source other than a perennial flowing stream and the impoundment or pit is to be constructed on and will be accessible to a parcel of land that is owned or under the control of the applicant and that is 40 acres or larger." This subsection defines a perennial stream as, ". . . a stream which historically has flowed continuously at all seasons of the year, during dry as well as wet years."

Furthermore, Section 85-2-306(3), MCA, sets the following parameters: ". . . within 60 days after constructing the impoundment or pit, the appropriator shall apply for a permit . . ."; and, "Upon receipt of a correct and complete application for a stockwater provisional permit, the department shall then automatically issue a provisional permit."

2. The Application in the matter was regularly filed on October 4, 1988, at 10:10 A.M.

3. The Department issued a Provisional Permit on December 27, 1988.

4. Permittee Durocher has built a stockwater reservoir in the NE¼ SE¼ SE¼ of Section 4, Township 27 North, Range 09 West, Teton County. This reservoir has a total capacity of approximately .50 acre-feet of water (Larson's letter to Pondera County Conservation District dated November 15, 1988. See file.) The reservoir impounds water from Scoffin Creek, a tributary of Dupuyer Creek, and said reservoir is built within the lands owned by Permittee Durocher, which encompass over 700 acres (testimony of Permittee).

5. The original water impoundment project started as a dug out pit-reservoir that was supplied water by a developed (upper) spring and also a lower spring. The lower spring was developed during excavation at the reservoir site. The size of this original impoundment was estimated at .25 acre-feet. The original dam did not go across Scoffin Creek. A natural earthen dike between the original impoundment and Scoffin Creek prevented water from the creek from entering the impoundment. Permittee Durocher "shaved off" the upper layers of this dike to allow Scoffin Creek water to supply this impoundment when the level of the water in Scoffin Creek rose (testimony of Permittee).

6. On August 18, 1988, Permittee Durocher decided to extend the dam across Scoffin Creek to:

(A) increase the size of the impoundment for livestock watering purposes,

(B) to include Scoffin Creek as part of the water supply to the impoundment, and

(C) to provide a crossing to the other side of Scoffin Creek (testimony of Permittee).

7. The file on record on this matter contains the following information on the sequence of events concerning Complainant Rappold's complaint to Permittee Durocher's water impoundment project:

August 8, 1988: Complainant Rappold made verbal complaint to the Teton County Conservation District (TCCD) alleging that ". . . Robert Durocher had built a dam across Scoffin Creek." This statement is from a TCCD letter to Kim Overcast, from the Water Rights Field Office in Havre, dated, August 15, 1988.

August 12, 1988: Complainant Rappold wrote a letter to the Soil Conservation Service (SCS) in Choteau, Montana, stating that ". . . an earth dam has been placed on a branch of Scoffin Creek . . ." and that ". . . this has decreased the stream flow . . ." on to Rappold's property.

August 16, 1988: The Havre Water Rights Bureau Field Office received a copy of Complainant Rappold's letter to the SCS in Choteau.

August 18, 1988: Larson, Manager of the Havre Water Rights Bureau Field Office conducted a field investigation on the complaint by Complainant Rappold.

August 29, 1988: Complainant Rappold filed Form 611, Objection to Application. NOTE: No Application had been filed yet by Permittee Durocher.

October 4, 1988: Permittee Durocher filed Form 605, Application for Provisional Permit for Completed Stockwater Pit or Reservoir.

8. Scoffin Creek enters Complainant Rappold's property approximately 300 yards from where Permittee Durocher's dam is located. Complainant Rappold alleges that Scoffin Creek flows year round through Complainant's property, even during 1988, which is the driest year Complainant Rappold can recollect. During 1988, Complainant Rappold observed brook trout in the range of 10 to 12 inches in length in Scoffin Creek (Complainant's testimony).

However, one of the requirements of Section 85-2-306(3), MCA, is that the reservoir be located in ". . . other than a perennial flowing stream . . .". In preparation for the first field investigation, Larson checked three reference sources to determine whether Scoffin Creek was a perennial or intermittent flowing stream. (Larson's memorandum dated December 7, 1988. See file.)

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In determining the type of flowing stream that Scoffin Creek is, Larson checked the following three sources:

(A) Teton County Water Resources Survey, published in June, 1962, by the State Engineers Office, predecessor to the DNRC,

(B) US Geological Survey maps of the area,

(C) US Forest Service map of the Lewis and Clark National Forest.

Although these three sources vary slightly as to where Scoffin Creek becomes a perennial flowing stream, all three sources agree that Scoffin Creek is an intermittent flowing stream at the location where Permittee Durocher's reservoir is built (Larson's testimony).

Furthermore, Permittee Durocher testified that around the middle of February, 1989, there was no water flowing in Scoffin Creek, either above or below Permittee Durocher's reservoir.

Therefore, based on the testimony on record the Hearing Examiner finds that Scoffin Creek is not a perennial stream.

9. Complainant Rappold alleges that construction of Permittee Durocher's dam took place between August 10th and August 15th, 1988, and Scoffin Creek did not flow any water through Complainant Rappold's property during this time as a result of the upstream dam built by Permittee Durocher.

However, on August 18, 1988, Larson conducted a field investigation of Permittee Durocher's water impoundment development. During this investigation Larson observed that the dam Permittee Durocher had built did not cross Scoffin Creek;

therefore, no waters from Scoffin Creek were being impounded or diverted into the dam (Larson's testimony). At this time Larson concluded, on behalf of the DNRC, that there had been no adverse impact to Complainant Rappold's water rights since Scoffin Creek water had not been impounded (Larson's testimony).

Therefore, based on the testimony on record, the Hearing Examiner finds that Complainant Rappold's allegations, that Scoffin Creek ceased flowing water due to Permittee Durocher's impoundment, have no merit.

10. Complainant Rappold has claimed water rights for subirrigation of lands adjacent to Scoffin Creek and for stockwater purposes by livestock drinking directly from Scoffin Creek. Complainant Rappold's claimed water rights were claimed pursuant to the SB76 Adjudication Procedure and are evidenced by Complainant's (Objector's) Exhibit 1.

11. As Scoffin Creek enters Complainant Rappold's property, in the NE $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 3, Township 27 North, Range 09 West, four beaver dams impound water on Scoffin Creek. Downstream, but still within the same 40 acre land description, an additional three beaver dams also impound water. Complainant Rappold's livestock drink from these beaver dams as well as from the natural channel of Scoffin Creek. These beaver dams were full or close to full of water on August 1, 1988, but Complainant Rappold noticed the beaver dams going dry by August 8, 1988. Eventually some beaver dams went dry while others lost so much water that the cattle couldn't drink from them because of the exposed mud. (Complainant's testimony).

No information was given or evidence introduced as to the amount of water necessary to satisfy Complainant Rappold's claimed stockwatering right, nor was any information given as to the number of livestock that water from Scoffin Creek or from the beaver dams in Scoffin Creek.

12. Complainant Rappold's subirrigation is accomplished by the beaver dams impounding water which raises the level of the underground water in the meadows. There are no man-made diversions in Scoffin Creek or at the beaver dams in Scoffin Creek to assist in the subirrigation of Claimant Rappold's meadows (Complainant's testimony). Complainant Rappold also testified he does not know how much water needs to flow in Scoffin Creek in order to satisfy his subirrigation.

13. Complainant Rappold observed in November 1988, that the flow of Scoffin Creek entering Permittee Durocher's dam was greater than the flow coming out of the dam. This observation was made using field glasses from a hillside on Complainant Rappold's property, approximately 150 to 200 yards from Permittee Durocher's dam. Complainant Rappold did not take any water flow measurements from Scoffin Creek within Permittee Durocher's property (Complainant's testimony).

14. Complainant Rappold testified as to his concern for the safety of the dam and to the possible consequence of having dirt and debris wash down to his meadows if the dam would breach. Complainant Rappold also testified as having observed erosion on the face of the dam. These observations were made from an airplane, as he flew over Permittee Durocher's property, and from

the top of a hill on Complainant Rappold's property. The observation hill is located approximately 150 to 200 yards from the Permittee's reservoir.

15. Complainant Rappold is agreeable to the issuance of a Permit if there is some means of bypassing Scoffin Creek flows to satisfy downstream stock and subirrigation uses.

16. The dam structure is stable, although the type of material used and the lack of compaction do not make the dam impermeable. The water seeps out of the reservoir at almost the same rate it goes in (Larson's testimony). Permittee Durocher testified as to his intention to try to seal the dam so that the water would not seep at the present rate.

The dam has an 18" culvert located approximately one foot below the crest of the dam and an emergency spillway which starts spilling water once the water level rises over half way up the 18" culvert (Permittee's testimony). The 18" culvert is capable of bypassing free flowing water at a rate of six cubic feet per second (cfs) and is capable of bypassing 12.5 cfs under the pressure of three feet of head (Larson's testimony).

17. Using the Orsborn method, which is an empirical method to determine the average annual discharge of a drainage, Scoffin Creek has the capability of flowing .6 cfs year round (Larson's testimony). However, no conclusive figures or estimates were given as to flows during the high peak run-off. Larson concluded that the emergency spillway on Permittee Durocher's dam is adequate for low flows, but he recommended that the spillway be widened and flattened out to accommodate higher flows (Larson's

testimony). Permittee Durocher testified that his intentions are to enlarge the emergency spillway. Permittee Durocher also testified that he is concerned with the safety of the dam because of his liability.

18. The present capacity of the reservoir is .5 acre-feet. However, this capacity represents two different impoundments, i.e., the original impoundment which receives its water mainly from the two developed springs, and the impoundment created when the original dam was enlarged and crossed Scoffin Creek. Therefore, in the scenario where the flows from Scoffin Creek would breach the dam, only the impoundment on Scoffin Creek, and not the original impoundment, would be lost. It is estimated that each impoundment is approximately .25 acre-feet in size (Permittee's testimony).

Larson testified that Durocher's reservoir does not pose a threat to human life or to personal property. Larson's testimony indicated that, in his opinion, if Permittee Durocher's dam was to be breached there would be very little physical evidence of said event below Objector Rappold's first beaver dam in Scoffin Creek, which is located immediately below the land owned by Permittee Durocher. (See also Larson's letter to Pondera County Conservation District in the file.)

19. There is no drainage device in Permittee Durocher's reservoir to bypass Scoffin Creek flows (Permittee's testimony). From when the reservoir is empty until such time as when the level of the water in the reservoir reaches the 18" culvert, no water, except for seepage water, flows past the reservoir.

On August 18, 1988, prior to Permittee Durocher damming up Scoffin Creek, Larson recommended to Permittee Durocher that he provide an adequate drainage device to satisfy downstream prior appropriation needs (Larson's testimony, and Larson's memorandum dated December 7, 1988. See File).

20. Access to the Permittee Durocher's property is through Complainant Rappold's land. This access crosses Scoffin Creek on Complainant Rappold's land at a point in the NW $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 2, Township 27 North, Range 09 West. This crossing is approximately 400 yards downstream from where Scoffin Creek leaves Permittee Durocher's land and enters Complainant Rappold's land (See Permittee Exhibit #2). Permittee Durocher testified that he had seen the flow on Scoffin Creek cease at the above referenced crossing two to three days prior to his building the original reservoir (Permittee's testimony). Completion of the original reservoir was August 8, 1988, and completion of the present impoundment project was August 21, 1988 (Permittee's testimony).

21. Permittee Durocher testified that during the period of August 1st to August 18th, he had seen Complainant Rappold's cattle drink at different times from Scoffin Creek. These observations were made from the road that parallels Scoffin Creek and which serves as the access road across Complainant Rappold's property to Permittee Durocher's property (Permittee's testimony).

22. Permittee Durocher's reservoir will lose approximately .62 acre-feet per year to evaporation (Larson's testimony).

PROPOSED CONCLUSIONS OF LAW

1. The Department gave proper notice of the hearing, and all relevant substantial and procedural requirements of law or rules have been fulfilled, therefore, the matter was properly before the Hearing Examiner.

2. The Department has jurisdiction over the subject matter herein, and all the parties hereto.

3. Pursuant to Section 85-2-306(3), MCA, the Department issued a Provisional Permit upon receipt of a correct and complete application for a Stockwater Provisional Permit. (See Findings of Fact 2 and 3.) However, if the Department determines after a hearing that the rights of other appropriators have been or will be adversely affected, it may revoke the permit or require the Permittee to modify the impoundment and make the Permit subject to terms, conditions, restrictions, or limitations it considers necessary to protect the rights of other appropriations.

4. The use of water for stockwatering purposes is a beneficial use of water. (See Section 85-2-102(2)(a), MCA. See Finding of Fact 4.)

5. The record in this matter fails to prove that the Department mistakenly categorized Scoffin Creek as an intermittent flowing stream. On the contrary, a review of the sources available to the Department, upon which the Havre Water Rights Bureau Field Office recommended Permittee Durocher apply for a Provisional Permit pursuant to 85-2-306(3), MCA, indicates

that the source was properly characterized as non-perennial for purposes of Permittee Durocher's application.

In determining that Permittee Durocher's water impoundment project would meet the requirements of Section 85-2-306(3), MCA (see Finding of Fact 1), the Department did not act on its own, but rather it followed the unanimous conclusions of all the reference sources checked. All the referenced sources concluded that Scoffin Creek is an intermittent flowing stream at Permittee Durocher's dam location. Furthermore, the unchallenged observation of Permittee Durocher that Scoffin Creek was not flowing any water immediately upstream or downstream from his reservoir, in February of 1989, or in August, 1988, prior to Permittee Durocher building the dam, also supports the finding that Scoffin Creek is an intermittent flowing stream. (See Finding of Fact 8.)

6. Complainant Rappold raises questions concerning the safety of Permittee Durocher's dam. (See Finding of Fact 14.) However, the issue in this matter is to determine if the rights of Complainant Rappold have been or will be adversely affected. The contested case hearing on the Permit pursuant to Section 85-2-306(3), MCA, is not the proper forum for complaints concerning property damage alleged to result from improper exercise of the Provisional Permit.

The Department has previously held that it cannot prevent a water user from enjoying his right based on the allegation that the right will be exercised in a manner unrelated to prior appropriation law, e.g. nuisance, negligence or trespass. See,

In the Matter of the Application for Change of Appropriation of
Water Right No. W138008 by Delbert Kunneman, April 23, 1984,
Final Order.

The Department's issuance of the Permit in no way insulates Permittee Durocher from any damage claims, or claims for injunctive relief, which Complainant Rappold may bring in a court of competent jurisdiction. That is, any damage to Complainant Rappold's property resulting from Permittee Durocher's dam breaching and causing Scoffin Creek to flood may give rise to some cause of action by Complainant Rappold. This issue, however, cannot be decided by the Department. The Provisional Permit issued by the Department must be exercised in conformance with all other applicable statutory and common law requirements. The right to use the Permit issued is acquired under all existing applicable laws, and those laws are a part of the right. See, Neel v. First Federal Saving of Great Falls, 207 Mont. 376 (1984).

7. Complainant Rappold's claimed water rights are based on stockwater and subirrigation uses (see Finding of Fact 10) as evidenced by Claim Nos. W159381, W159383, and W159386. (See Preliminary Matters (2).) Claim Nos. W159383 and W159386 are based on subirrigation use of water without diversion. (See Finding of Fact 12.) The Montana Water Court, in the present statewide adjudication, has held that subirrigation is not a protectable means of diversion. Specifically the Water Court has stated: "While the water rights for subirrigation and natural overflow are decreed, the owner of the right does not have a

right to demand continued right of [sic] the water by these means of diversion." (See "Report of the Water Master on the Musselshell River Above Roundup Basin", by Edward S. Steinmetz, Water Master, May 1, 1985.)

The Department also previously has held that an appropriator cannot assert a subirrigation use of water to defeat subsequent permit applications. See, In the Matter of Application for Beneficial Water Use Permit Nos. 18845-s76LJ and 18846-s76LJ by Everett G. and Anna D. Orem, August, 1984, Proposal for Decision; In the Matter of the Application for Beneficial Water Use Permit No. 39887-s76D by West Kootenai Water Users Association, February 13, 1986 Proposal for Decision. Therefore, the Examiner concludes that:

(A) Subirrigation is not a protectable means of diversion, and;

(B) A subirrigation use of water cannot defeat a subsequent permit application.

8. Complainant Rappold has failed to prove that Permittee Durocher's impoundment as it presently exists on Scoffin Creek has adversely affected his stockwater rights.

The complaints filed by Complainant Rappold were on August 8, 1988, with the Teton County Conservation District; August 12, 1988, with the SCS in Choteau, MT; and on August 16, 1988, with the Havre Water Rights Bureau Field Office. (See Finding of Fact 7.) However, Permittee Durocher's original diversion, which was completed by August 8, 1988, (see Finding of Fact 20) did not impound or divert waters from Scoffin Creek. (See Findings of

Fact 5, 6 and 18.) The fact that the dam that Permittee Durocher had built did not go across Scoffin Creek was substantiated by Larson's field investigation on August 18, 1988. (See Finding of Fact 8.)

The answer as to why Scoffin Creek dried up in August of 1988 could be a complex one. However, two obvious reasons are that the summer of 1988 was the driest summer which Complainant Rappold could recollect and the very nature of the flow characteristics of Scoffin Creek, which is that of an intermittent flowing stream as designated by the State Engineers Office, the USGS quad map, and the U.S. Forest Service map. (See Finding of Fact 8.)

9. However, the record on file shows a potential for Complainant Rappold's stockwater rights to be adversely affected by Permittee Durocher's dam.

Permittee Durocher's dam is constructed so that, when the reservoir is empty, all of the waters coming in from Scoffin Creek are impounded until such time as the water level in the reservoir reaches the 18" culvert, which is located approximately 1 foot below the crest of the dam. (See Finding of Fact 19.)

Although at present, the dam seeps as much water as enters the impoundment, Permittee Durocher intends to seal the dam to prevent seepage. (See Finding of Fact 16.) Therefore, the threat of Permittee Durocher's dam preventing downstream senior appropriators from receiving their share of Scoffin Creek water is real. Even if the dam is not sealed to prevent seepage, Permittee (Applicant's) Exhibit 4 shows that on September 5,

1988, at 7:00 A.M., more water was flowing into the reservoir than was flowing out. Thus the lack of a drainage device to balance the inflow vs. the outflow is undisputably a threat to prior downstream appropriations.

Furthermore, with the estimated loss of .62 acre-feet per year to evaporation (see Finding of Fact 23), and the intermittent flow status of Scoffin Creek (see Finding of Fact 8), the need to provide an adequate means of bypassing creek flows is imperative.

10. Complainant Rappold did not specify the amount of water needed from Scoffin Creek to satisfy his claimed prior stockwater right. (See Finding of Fact 11.) However, Complainant Rappold filed Claim for Existing Water Right No. 159381-s41M, for stockwater purposes. This claim specifies a water use for 250 cattle and 25 horses which is equivalent to 287.5 animal units. It also specified a flow rate of 300 miner's inches and a yearly volume of 4.88 acre-feet.

Under Montana Supreme Court guidelines neither a flow rate nor a volume is decreed for stock drinking directly from a stream; however, a remark is added to the claim which specifies a consumptive use of 30 gallons per day per animal unit. As a practical matter a daily volume of water can be converted into the flow rate necessary to attain said volume of water. However, conversion to flow rate only includes the amount of water needed to satisfy the daily stockwater consumption. A larger flow rate would be necessary to convey, or act as a carrier, for the specified consumptive volume of water per animal unit.

Consequently, reference is hereby made of the Final Decree issued in the Powder River Basin. In this Final Decree flow rates for stock drinking directly from a stream were decreed at 10 gpm. (See Judgement Powder River Final Decree by W. W. Lessley, Chief Water Judge, April 14, 1983.)

THEREFORE, based upon the foregoing Findings of Fact and Conclusions of Law, the Hearing Examiner makes the following:

PROPOSED ORDER

Permit to Appropriate Water No. 68514-s41M by Robert E. Durocher must be modified and reissued to include the following conditions:

A. Issuance of this Permit by the Department shall not reduce the Permittee's liability for damages caused by exercise of this Permit, nor does the Department, in issuing this Permit, acknowledge any liability for damages caused by exercise of this Permit, even if such damage is necessary and unavoidable consequence of the same.

B. The Permittee shall bypass the flows of Scoffin Creek at the rate necessary to maintain a constant flow rate of 10 gpm in Scoffin Creek through Complainant Rappold's property, and only at such times as Complainant Rappold has a need for said water. NOTE: The amount of water seeping from the reservoir is to be included in the constant 10 gpm flow rate through Complainant Rappold's property. Therefore, if the seepage equals or surpasses the flow of Scoffin Creek into the reservoir, no additional flow bypass is necessary.

However, as long as the water in Scoffin Creek flows into the beaver dams on Complainant Rappold's property, thus facilitating the dissipation, percolation, and evaporation of said water at a higher rate than it would ordinarily occur if the water flowed in its natural channel, the Permittee is only obliged to provide said 10 gpm flow rate at the point where Scoffin Creek enters Complainant Rappold's property.

The required bypass shall be established by placing an accurate measuring device at the point immediately before where Scoffin Creek enters Complainant Rappold's property. The Permittee shall keep a record of the daily flow measurements during the times Permittee is impounding water. These records shall be submitted to the Havre Water Rights Bureau Field Office by November 30th of each year, and shall also be made available to the Department upon request.

C. Once the Permittee has identified the site of the measuring device, he must obtain the assistance of the Havre Water Rights Bureau Field Office or the SCS, or other technically qualified help, in measuring the creek at the site and properly placing and adjusting the measuring device to ensure accurate records.

D. After a minimum of two years of diversion and record keeping by the Permittee, any party in this case may request a Department review of the bypass flow requirement. The Department will then contact the parties and arrange to have flow information exchanged, and to schedule a hearing on any proposed modification of the bypass flow requirement, if necessary.

The amount of flow which Permittee must bypass may be amended if a review of the Permittee's data and the Complainant's water availability during the corresponding time period indicates that the amendment is warranted.

NOTICE

This proposal is a recommendation, not a final decision. All parties are urged to review carefully the terms of the proposed order, including the legal land descriptions. Any party adversely affected by the Proposal for Decision may file exceptions thereto with the Examiner (204 South Daws, P.O. Box 438, Lewistown, MT 59457); The exceptions must be filed and served upon all parties within 20 days after the proposal is mailed. Section 2-4-623, MCA. Parties may file responses to any exception filed by another party within 20 days after service of the exception.

Exceptions must specifically set forth the precise portions of the proposed decision to which exception is taken, the reason for the exception, and authorities upon which the exception relies. No final decision shall be made until after the expiration of the time period for filing exceptions, and the due consideration of any exceptions which have been timely filed.

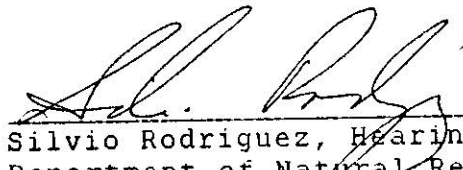
Any adversely affected party has the right to present briefs and oral arguments pertaining to its exceptions before the Water Resources Division Administrator. A request for oral argument must be made in writing and be filed with the Examiner within 20 days after service of the proposal upon the party.

Section 2-4-621(1), MCA. Written requests for an oral argument must specifically set forth the party's exceptions to the proposed decision.

Oral arguments held pursuant to such a request normally will be scheduled for the locale where the contested case hearing in this matter was held. However, the party asking for oral argument may request a different location at the time the exception is filed.

Parties who attend oral argument are not entitled to introduce new evidence, give additional testimony, offer additional exhibits, or introduce new witnesses. Rather, the parties will be limited to discussion of the evidence which already is present in the record. Oral argument will be restricted to those issues which the parties have set forth in their written request for oral argument.

Dated this 26th day of June, 1989



Silvio Rodriguez, Hearing Examiner
Department of Natural Resources
and Conservation
PO Box 438
Lewistown, MT 59457
(406) 538-7459

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Proposal for Decision was duly served by first class mail upon all parties of record at their address or addresses this 26th day of June, 1989, as follows:

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